ment in both civil suits should not be heard together but the applications for stay should be heard first. I then allowed the applications for stay pending reference to arbitration. I then made no order in each of the Order 14 applications for summary judgment of the two civil suits herein and ordered further that costs of the applications that day be reserved to the arbitrator to be appointed.

Order accordingly.

Solicitors: *Asbir, Hira Singh & Co.; Yeoh Kian Teik & Co.*

BANK BUMIPUTRA MALAYSIA BHD. v. DORIC DEVELOPMENT SDN. BHD. & 2 ORS.

[A.C.J. (Peh Swee Chin J.) June 16, 1987]

[Ipoh – Civil Suit No. 23-204-1986]

Banking – Money lent – Secured by charge under National Land Code – Whether charge same as mortgage under English common law – Differences.

Land Law – Charge under National Land Code – Security for money lent – Whether charge same as mortgage under English common law – Differences.

The plaintiff had earlier sued the first defendant for a certain sum due on a banking account in respect of which the plaintiff had granted an overdraft facility. The money which was lent to the first defendant was secured by a charge over certain lands of the company. In addition, the third defendant guaranteed the due payment of the money.

The learned Registrar granted leave to enter final judgment against them in favour of the plaintiff. The first and third defendants appealed against the learned Registrar's decision.

Held, dismissing both appeals: (1) the premise that a charge under the National Land Code is the same as an English mortgage at common law is patently erroneous;

(2) the rules of mortgage at common law would not apply at all to a charge under the National Land Code.

Cases referred to:

(1) *Khaw Joo Tok & Ors.* v. *Ng Boo Bee & Ors.* (1920) 5 15 S.S.L.R. 183.

(2) *Bank Bumiputra Malaysia Berhad* v. *Esah bt Abdul Ghani* [1986] 1 M.L.J. 16.

APPEAL FROM REGISTRAR'S DECISION.

Ting Hui (Miss) for the plaintiff.
Tony Dhana for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: I have earlier dismissed the appeals of the first defendant (the company) and the third defendant (the guarantor) respectively from a decision of the learned Registrar granting leave to enter final judgment against them in favour of the plaintiff (the bank) on an Order 14 application for summary judgment. I now give my reasons.

The bank has earlier sued the company for $6,460,603.74 with interest and costs due on a banking account in respect of which the bank had granted an overdraft facility. Although this action is not a foreclosure summons, it will be pertinent to point out that the money so lent and so owing was also secured by a charge over certain lands of the company, in addition to its being secured also by a letter of guarantee signed by the guarantor in favour of the bank and concerned herein. In this action, therefore the bank has sued the company on a covenant to pay money so lent and so owing, and the guarantor on her guarantee to pay the same.

Before me on appeal, learned counsel for the company submitted implicitly on the basis that the said charge executed by the company was an English mortgage at common law or a transaction exactly like such an English mortgage. On the said basis, he submitted that the equity of redemption had been lost because of the order of sale by public auction made by the court. He relied on the case of *Khaw Joo Tok & Ors.* v. *Ng Boo Bee & Ors.*[1] as authority for the proposition that because of the loss of such equity of redemption, the bank could not sue the company on a covenant to pay the residue.

In the *Ng Boo Bee* case,[1] certain property was mortgaged, certainly not in the form of a memorandum of charge as under our present National Land Code or its predecessor, the former Land Code of 1926 of the Federated Malay States. The mortgage took the form of, and was intended to be, a mortgage as in England at common law. It was held to the effect as follows, after the consideration of various English authorities on such mortgage, *i.e.* that if a mortgagee first proceeded in court on the covenant to pay against the mortgagor, and obtained part but not complete payment of his debt, he could still foreclose the mortgaged property for the residue or any deficiency; but on the other hand, if the mortgagee foreclosed the property first and then found the proceeds insufficient to pay himself completely, then equity would only permit him to sue the mortgagor on

the covenant for the residue by requiring the mortgagee to give a right of redemption to the mortgagor but if after foreclosure decree absolute or sale and the mortgaged property had already been sold to a stranger, the mortgagee had put it out of his power to reconvey the same to the mortgagor, equity would not permit the mortgagee to sue the mortgagor on the latter's covenant to pay for the residue or deficiency.

It is necessary to set out the *ratio decidendi* of *Ng Boo Bee's* case[1] in order to understand learned counsel's submission.

I found the submission to have no substance at all for the following reasons.

In the first place, the premise that a charge under National Land Code is the same as an English mortgage at common law is patently erroneous. A charge is governed by detailed statutory provisions of the National Land Code while an English mortgage at common law was a horse of a different colour altogether. It is not necessary to delve into all the differences between a charge and a mortgage beyond mentioning one or two of such differences. In an English mortgage at common law, the mortgaged property was transferred to the name of the mortgagee on the creation of the mortgage with a proviso for redemption. Under the said proviso, the mortgagee agreed to re-transfer the mortgaged property by a certain date beyond which it was stated to be irredeemable. Equity stepped in and provided the equity of redemption, by which the right to redeem was extended beyond the said date and would be lost only on foreclosure or sale.

The rules of mortgage at common law would therefore not apply at all to a charge under the National Land Code. Even assuming that they were applicable to a charge under the National Land Code for the sake of academic discussion of the objection raised by learned counsel, *Ng Boo Bee's* case[1] would have been clearly distinguishable, because it was common ground in the instant case that though an order of sale by public auction was made in the earlier originating summons, the charged land had not in fact been sold as yet as at the close of submissions of counsel, so that the supposed mortgagee, *i.e.* the bank, would still have been able to give a right of redemption of the property in question on payment of the sum due. In other words, the bank had not made it impossible for the land in question to be restored to the company on payment of the sum due.

I have used the expression "at common law" rather pointedly when referring to the mortgage, because the common law applicable to a mortgage was materially changed by the Law of Property Act 1925 of England.

Arguing for the guarantor, learned counsel submitted that no account for the money due was supplied, and the bank was therefore put to strict proof. Leave should be granted for the case to go for trial.

The short answer was that by clause 6 of the relevant letter of guarantee, any account stated by the bank and duly certified by any of the bank's officers would have to be treated by the guarantor as conclusive. The affidavit of the bank's manager (enclosure 8), stating the sum with interest thereon, would be within clause 6 aforesaid. Quite apart from the clause 6, it would not be sufficient for the guarantor to merely say that the account was not supplied and that the bank would therefore be put to strict proof, for such account could always have been obtained on request to the bank or from the company, and putting merely the bank to strict proof would not amount to a condescension on particulars by the guarantor when showing cause to an Order 14 application, as after all by averring that the plaintiff be put to strict proof would only amount to a mere denial.

Lastly, it was submitted that the proceedings herein should be stayed because of the order of sale by public auction obtained in the earlier originating summons, but counsel did not give reasons for this submission; but on looking at his client's affidavit it would appear to be based on the points raised therein to the effect that due to "double recovery" by the bank, the present action was not maintainable. The Federal Court's decision in *Bank Bumiputra Malaysia Berhad* v. *Esah bt Abdul Ghani*[2] has made it abundantly clear that, for the purpose of the instant case, in the absence of any express condition requiring that "foreclosure proceedings" be proceeded with and completed first before suing the guarantor, the bank could not be compelled to sue the principal debtor, *i.e.* the company, first. Such being the case, counsel's submission that *Esah bt Abdul Ghani's* case[2] was distinguishable from the instant case because of foreclosure proceedings not being proceeded with therein at all could not possibly achieve the desired result intended by counsel.

I therefore dismissed the appeals of both the company (first defendant) and the guarantor (third defendant) with costs.

Order accordingly.

Solicitors: *Hong Chew King & Co.; Zain & Co.*

MANJIT SINGH & 2 ORS. v. HO YONG SEE & ANOR.

[A.C.J. (Peh Swee Chin J.) May 23, 1987]

[Ipoh – Civil Appeal No. 38 of 1984]

Landlord and Tenant – Rent-controlled premises – Vacant possession – Claim for – Principles applicable to section 16(1)(f) of the Control of Rent Act 1966 – Only one co-owner requires the premises – Effect of.

The plaintiffs, the registered proprietors of certain controlled premises, claimed vacant possession of the same under section 16(1)(f) of the Control of Rent Act 1966. The plaintiffs were brothers: the first plaintiff a medical practitioner, the second plaintiff a soldier and the third plaintiff a police detective. It was not disputed that it was the first plaintiff alone who required the premises for himself and his family members.

The defendants carried on the business of pawnbrokers. Both the first plaintiff and the defendants gave their reasons to support their contentions. The learned magistrate gave judgment in favour of the plaintiffs. The defendants appealed from this decision.

Held, allowing the appeal: (1) the owner must establish a genuine present need and such need should not be purely based on considerations of reference and convenience. It must be something more than a mere desire but something less than an absolute necessity. The tenant will have to prove that greater hardship will be caused by granting the order of possession than by refusing it and in this connection, the test is hardship and not mere inconvenience. The onus of proving the availability of adequate accommodation is on the owner but the owner need not prove such accommodation to be a suitable alternative which implies some measure of quality in addition to some quantitative measure. Such onus of proving "suitable alternative accommodation" lies only in a case under section 16(1)(m) of the Control of Rent Act 1966;

(2) the learned magistrate had directed himself correctly on the question of the genuine present need. He had also dealt very correctly with the question of proof of greater hardship which the defendants had patently failed to establish. The learned magistrate had not erred when he came to the conclusion that the defendants had failed to prove any hardship at all;

(3) however, following *Liew Sam Lee* v. *Kwan Teck Meng & Ors.*[3] if the controlled premises are required by some but not all the joint owners, then the joint owners cannot recover the premises in question in an action of the kind under section 16(1)(f) of the Control of Rent Act 1966:

(4) in the circumstances, the appeal was allowed.

Cases referred to:

(1) *The Perak Hauliers Ltd.* v. *The Cycle & Carriage Co. Ltd.* [1962] M.L.J. 7.

(2) *Rajaratnam* v. *Gunn Lay Teik & Anor.* [1961] M.L.J. 199.

(3) *Liew Sam Lee* v. *Kwan Teck Meng & Ors.* [1964] M.L.J. 365.

CIVIL APPEAL.

I. Raj for the plaintiffs.
Henry Lim for the defendants.

Cur. Adv. Vult.

Peh Swee Chin J.: The plaintiffs, the registered proprietors of certain controlled premises, claimed vacant possession of the same under section 16(1)(f) of the Control of Rent Act 1966 which is set out below for convenience:

"16.(1) Except for an application made under sections 18 and 18A for the recovery of possession of any controlled premises or any part thereof for the purpose of effecting or causing to be effected thereon any development, all applications for the recovery of possession of such premises or any part thereof shall be made to a court; and no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the court except in any of the following cases –

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) where the owner of the controlled premises reasonably requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust, and –

(i) there has been no change by purchase in the ownership of the premises since the fifteenth day of February, 1942; or

(ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by purchase in the ownership of the premises within one year next preceding the date of such notice:

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommo-